



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-06-4

QUESTION

Does the conflict of interest law, G. L. c. 268A, permit a private nonprofit organization to give and a state, county or municipal employee to accept an unsolicited award of substantial value in recognition of the public employee's outstanding public service, leadership, dedication or potential?

ANSWER

Yes. The conflict of interest law permits the award to be given and accepted under the facts discussed below which establish that the award is not a gift in violation of G. L. c. 268A, § 3 or an unwarranted privilege in violation of § 23(b)(2) of the statute.

FACTS¹

You represent a private non-profit philanthropic consulting firm ("the Firm"). The Firm runs a fellowship program ("the Fellowship") which is an awards program that recognizes individuals who perform outstanding community service in Greater Boston. Each year six persons ("the Fellows") are chosen for recognition and are awarded \$30,000 (\$10,000 per year for three years).

The Firm designed the Fellowship for an anonymous donor in order to achieve the donor's goal of recognizing individuals of unusual creativity, vision and initiative who are quietly making the community a better place. The Fellowship provides recognition and direct financial support to individuals of creativity, vision and leadership who work in community service in Greater Boston.

The individuals chosen as Fellowship recipients work for government, community organizations, or are outstanding volunteers. Diverse in race, class, occupation and age, their one common characteristic is leadership. The Fellowships are not awarded to elected public officials or to public employees who are in official positions to regulate or otherwise exercise their official powers over the Firm.

Potential Fellows do not apply for the Fellowship. Instead, nominations for the Fellowship are made by a group of "spotters." Individuals representing diverse parts of the Boston community, the spotters are volunteers who serve for a two-year period. During that time, the spotters agree to identify individuals who, by virtue of their leadership and service in Boston neighborhoods, qualify for the Fellowship. The spotters' identities are not revealed to the individuals they nominate for the Fellowship. A small selection committee reviews the nominations and makes the final selection. The Firm's staff conducts a complete review and reference check for each finalist.

Nominees must be engaged in some form of community service. They may work for a government agency or a community organization, or they may be doing volunteer work.² The Fellowship recipients represent the best practitioners of their form of community service, those who perform their jobs with creativity and initiative, contributing to the community in ways that go beyond the scope of their specific job description. Their working lives represent extraordinary stories of courage, struggle and commitment. They are self-starters who are likely to make good use of flexible resources. Selecting a group of Fellows that represents the diversity of Boston is a prime consideration.

The Fellowship funds awarded are absolutely unrestricted. The recipients may use them to stabilize their personal finances, to take time off for special projects or a sabbatical. Some Fellows might choose to go back to school or obtain some skills training. Others might choose to use the funds as social venture capital to seed new projects. The Fellows are not required to continue in their present work.

No reports are required of the Fellows on their activities. Other than appearing at an initial presentation, the Fellows are not required to work together or to attend meetings. The Fellows are invited to share their experiences and discuss their work over the course of the year, but such participation is not mandatory.

DISCUSSION

The Fellowship, including the \$30,000 award, is a gift. The provision of awards and other gifts of substantial value to and the acceptance and receipt of such gifts by Massachusetts state, county and municipal employees potentially raise issues under §§ 3(a) and (b) and 23(b)(2) of G. L. c. 268A.

Section 3(a), in relevant part, prohibits anyone from, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly giving, offering or promising any thing of substantial value to any state, county or municipal employee for or because of any official act performed or to be performed by the employee. Section 3(b), in relevant part, prohibits a state, county or municipal employee from, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asking, demanding, exacting, soliciting, seeking, accepting, receiving or agreeing to receive anything of substantial value for himself. Section 23(b)(2), in relevant part, prohibits a state, county or municipal employee from, knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated persons.

Accordingly, the conflict of interest law issues raised by the award of the Fellowship to a public employee are whether the Fellowship is being awarded and accepted for or because of the public employee's official acts or acts within his official responsibility, in violation of § 3, or whether the Fellowship is an unwarranted privilege

being secured by the public employee through the use of his official position, in violation of § 23(b)(2).³

Section 3

A gift to a public employee implicates § 3 when there is “a link” between the gift and an official act.⁴ A gift of substantial value to a public employee violates the section when it is provided to the employee “as a reward for past action, to influence [the employee] regarding a present action, or to induce [the employee] to undertake a future action.”⁵ That is, a gift to a public employee violates § 3 where there is “linkage to a particular official act, not merely the fact that the official was in a position to take some undefined or generalized action...[that] could benefit the giver of the gratuity.”⁶

Where, as in the case of the Fellowship, an award is given in *bona fide* recognition of a public employee’s creativity, dedication, vision, record of community service, leadership or potential, generally, and not because of any particular act by the recipient as a public employee, it is not given to reward, induce or influence any official act or act within the official responsibility of the public employee. In the case of such an award, there is no linkage between the gift and any particular official act performed or to be performed by the recipient. Such an award would, therefore, not be given or received for or because of the public employee’s official act or acts within his official responsibility in violation of § 3. Accordingly, the award of the Fellowship to a Massachusetts public employee and the employee’s receipt of the Fellowship would not violate § 3.

Section 23(b)(2)⁷

The receipt of a gift, such as an award, is a privilege within the meaning of § 23(b)(2). A gift to a public employee raises § 23(b)(2) concerns when it is, in whole or in part, motivated by or received because of the public employee’s status or power in his official position. When a public employee, knowingly or with reason to know, seeks or accepts a gift provided to him because of his status as a public employee or because of the powers that he can exercise in his official position, he uses his official position to secure the privilege of the gift.⁸ Where the gift is of substantial value and not properly available to similarly situated persons and, thus, unwarranted, the employee’s acceptance of the gift violates § 23(b)(2).

In the case of the Fellowship, the above-stated facts establish that the \$30,000 award, in addition to not being given for or because of any official act performed or to be performed by the recipient public employee, is also not being given because of the recipient’s official status or power as a public employee. First, the Fellowship is not limited to public employees, but is also awarded to persons providing community service in private organizations and as private individuals. Indeed, most Fellows are not public employees. In addition, the award is entirely “without strings” and the Fellows are not required to continue their present work; a public employee Fellowship recipient would not be obligated to remain in his official position. Furthermore, the Fellowship is not solicited or applied for by the public employee and the award is funded by an

anonymous donor. Finally, the Fellowships are not awarded to public employees who are in positions to regulate or otherwise exercise their official powers over the awarding entity. The combination of these facts ensures that the Fellowships would not be awarded to or received by public employees due to or through the use of their official status or powers, but would instead be given in *bona fide* recognition of the public employees' outstanding public service, leadership, dedication or potential.

Accordingly, under the above-stated facts, a Massachusetts public employee's receipt of the Fellowship would not violate § 23(b)(2).⁹ Under these circumstances, an individual's status as a public employee will not disqualify him under G. L. c. 268A from eligibility to receive the recognition and cash award for his outstanding service to the community represented by the Fellowship.

CONCLUSION

For the above-stated reasons, we conclude that the conflict of interest law, G. L. c. 268A, permits a private nonprofit organization to give, and a Massachusetts state, county or municipal employee who does not regulate or otherwise exercise official power over the giver to accept, an unsolicited, "no strings attached" award of substantial value in *bona fide* recognition of the public employee's outstanding public service, leadership, dedication or potential.

DATE AUTHORIZED: November 8, 2006

¹ The facts are as stated in the letter requesting Commission advice on the Firm's behalf and on the Firm's website, as supplemented through telephone conversations.

² Between 1991 and 2006, the overwhelming majority of the Fellowship recipients were privately employed.

³ Anything with a value of \$50 or more is of substantial value for G. L. c. 268A purposes. See *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000), citing *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976). Thus, the Fellowship award is of substantial value for G. L. c. 268A purposes.

⁴ *Scaccia v. State Ethics Commission*, 431 Mass. 351, 355 (2000).

⁵ *Id.* at 356.

⁶ *Id.*

⁷ Although the giver of a gift, including an award, to a public employee cannot violate § 23(b)(2), we are advising you on this issue because the giver of an award needs to know whether the award will place the recipient in jeopardy of violating the law.

⁸ See *EC-COI- 87-7*; See also *Commission Advisory No. 04-02, Gifts and Gratuities*.

⁹ The public employee would be required to make a public disclosure of his receipt of the Fellowship, including the award, pursuant to G. L. c. 268A, § 23(b)(3).